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No. 85-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD J. TRUMP, *et al.*

Appellants,

v.

RODERICK CHU, Individually and as Commissioner of the New York State Tax Commission

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY MEMORANDUM FOR THE APPELLANTS

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In its Motion to Dismiss or Affirm ("Mot."), the State has utterly failed to respond to our arguments that New York's Ten Percent Tax on transfers of interests in realty violates the Equal Protection Clause.

1. Although the Ten Percent Tax is nominally directed at gains, its imposition in the first instance depends entirely upon whether the gross consideration for the transfer is $1 million or more. Thus, the tax is triggered only when there is a sale for $1 million or more. Sales for less than $1 million are entirely

exempt. In these circumstances, the State can hardly deny that the tax turns on the amount of the gross receipts from a particular transfer.

Such classification of taxpayers on the basis of gross receipts is prohibited by the Equal Protection Clause, as explicated by this Court's decision in *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550 (1935). While the State concedes that taxpayers with equal amounts of gains may be treated differently under the statute, it flatly dismisses such discriminatory treatment as "irrelevant to the constitutional issues here" (Mot. 4). With all due respect, the discrimination worked by the $1 million cutoff in the statute could not be more relevant to the constitutional questions presented.

In the State's view, the $1 million cutoff amount is justified on the grounds that "a greater absolute gain is more likely" in "substantial transactions" and upon "the cost and difficulty of administering and collecting such a tax for all real estate transactions . . ." (Mot. 4). But as we have pointed out at pp. 11-12 of our Jurisdictional Statement ("J.S."), both of these precise contentions were rejected by this Court more than 50 years ago in *Stewart Dry Goods*. As the Court there stated, "Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits . . ." (294 U.S. at 558). Nor can the tax be justified on the basis of purported administrative convenience. There is no administrative necessity that the tax be geared to gross consideration rather than gain. "If the [State] desires to tax [gains from real estate transfers] it must take the trouble equitably to distribute the burden of the impost. Gross inequalities may not be ignored for the sake of ease of collection" (294 U.S. at 560). Surely, the State cannot at this juncture resurrect arguments that this Court long ago laid to rest as credible defenses to an unconstitutional state taxing scheme. Since the decision below is incompatible with *Stewart Dry Goods*, the appeal warrants plenary consideration by this Court.

2. Contrary to the State's further argument (Mot. 3), the $1 million cutoff of the Ten Percent Tax is not analogous to monetary classifications in income and estate taxes. The base of an income tax is net income; the personal exemptions and the standard deduction allowed by the income tax merely enhance its progressive nature and insure that the tax is premised on the principle of ability to pay. "An income levy, by its very nature, assures equality of treatment, because the burden of the exaction varies with increase or decrease of return on capital invested and with the comparative success or failure of the enterprise." *Stewart Dry Goods Co.* v. *Lewis*, *supra*, 294 U.S. at 560. In marked contrast to net income taxes, the $1 million cutoff makes it possible for the Ten Percent Tax to be levied on small gains while large gains are entirely exempt.

Nor can the $1 million cutoff be defended, as the State suggests, on the ground that it is similar to provisions found in many estate tax statutes under which estates that do not exceed a certain amount are exempt from the tax. Unlike real estate developers who are subject to the Ten Percent Tax, those persons who are subject to estate taxes are not competing with one another in the marketplace. But exempting some real estate developers from the Ten Percent Tax on the basis of the $1 million cutoff, combined with the discrimination against cooperative and condominium developers (see J.S. 12-17), gives distinct competitive advantages to certain classes of real estate transferors. On the other hand, taxing only estates which exceed a certain size simply reduces to some extent amounts passing to the beneficiaries of those estates. This does not, however, place them under any meaningful competitive disadvantage vis-a-vis the beneficiaries of the smaller, untaxed estates.

3. *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573 (1938), upon which the State relies (Mot. 6-7) as demonstrating "[t]he limited application" of *Stewart Dry Goods*, is wide of the mark. That case has no relevant bearing

upon the problem of unlawful classifications, which is at the heart of our challenge to the Ten Percent Tax.[1] The tax at issue in *New York Rapid Transit* was a three percent excise tax on gross income, imposed on every "utility" doing business in the City of New York, "for the privileges of exercising its franchise" (303 U.S. at 575-576). The taxpayer based its challenge to the tax, *inter alia*, on a claimed lower ratio of gross income to profit than other utilities, arguing that the tax discriminated against the New York Rapid Transit Corporation because it was less able to pay than other utilities. In rejecting this claim, this Court explained that *Stewart Dry Goods* does not prohibit a uniformly imposed flat-rate gross receipts tax. Rather, the Court had struck down the tax on retailers in *Stewart Dry Goods* because, by increasing the tax rate with the sales volume, the statute " 'exact[ed] from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other' " (303 U.S. at 583, quoting *Stewart Dry Goods Co.* v. *Lewis*, *supra*, 294 U.S. at 566).

Here, however, the Ten Percent Tax is not uniformly imposed on equal amounts of gain. By exempting transferors of real property for less than $1 million, it increases the tax rate from zero to 10% on the basis of gross consideration in the same manner that *Stewart Dry Goods* prohibits. Accordingly, the Ten Percent Tax cannot pass constitutional muster because it exacts different tolls from transferors who are identically situated in the amount of gain they realize. It is plain that the Ten Percent Tax is nothing more than a prohibited gross receipts tax in the guise of a gains tax.[2]

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1 The plaintiff's unsuccessful challenge in *New York Rapid Transit Corp.* to the imposition of a special tax on the class of utilities is immaterial to the present case, where the challenged distinction between taxpayers drawn by the statute is based solely upon the consideration for transfers and the kind of property they develop, rather than upon the substantive nature of their business.

2 There is no basis for the State's reliance (Mot. 3, n. **), upon cases upholding license taxes based upon gross receipts. While this Court has

4. Finally, in attempting to improvise a rational basis for the statutory discrimination against cooperative and condominium developers, the State argues (Mot. 8) that the laws of New York themselves provide distinctions between condominiums and cooperatives and other types of realty. But abstract statutory distinctions in the law of real property do not, standing alone, justify the discrimination worked by the Ten Percent Tax. As we have pointed out (J.S. 12), there must be a rational relationship between the statutory discrimination and a legitimate state purpose.

Here, the State and the decision below attribute various regulatory goals to the legislature in support of the discrimination against cooperatives and condominiums. For the reasons we have previously stated (J.S. 13-17), it is plain that the State's justifications for the discrimination are entirely implausible. For example, the State continues to argue (Mot. 10) that condominiums and cooperatives involve greater administrative costs to the state government which the Ten Percent Tax could have been intended to fund. But it is entirely disingenuous for the State to continue to advance this argument before this Court in the face of the compellingly clear legislative history we have cited (see J.S. 14-15) that the state legislature intended the various statutory filing fees—and not the Ten Percent Tax—to reimburse the State for the costs of regulating the sale of cooperatives and condominiums. The State's failure to address this legislative history is emblematic of the fundamental weakness of its various rationalizations for the statutory discrimination.

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sustained such taxes on the basis of the competitive advantage that higher-volume businesses enjoy, the transferor of realty for more than $1 million has no competitive advantage over the transferor for less than $1 million that would justify the statutory discrimination. See *Stewart Dry Goods Co.* v. *Lewis, supra*, 294 U.S. at 564-566.

CONCLUSION

For the reasons stated above and in our Jurisdictional Statement, probable jurisdiction should be granted.

Respectfully submitted,

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Dated: October 1985.